SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 773

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER AND ELMER L. KIER, COPARTNERS AS ATKINSON-KIER COMPANY, AND MASON-WALSH-ATKINSON-KIER COMPANY,

Appellants,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON; HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, CONSTITUTING THE TAX COMMISSION OF THE STATE OF WASHINGTON,

Appellees.

STATEMENT AS TO JURISDICTION.

The jurisdiction of the Supreme Court of the United States is invoked under the Judicial Code, section 237(a), as amended by the Act of February 13, 1925, U. S. C. A., Title 28, section 344(a).

The statute of the State of Washington, the validity of which is drawn in question on the ground of its being repugnant to the Constitution and laws of the United States, is the Occupation Tax Act of the State of Washington, Chapter 57, Laws of Washington, Special Session 1933, com-

mencing at page 157. This Act provides for the levy and collection

> "from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from every person engaging or continuing within this state in any business * * * an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent."

The decree of the Supreme Court of the State of Washington was rendered October 28, 1936. A petition for rehearing was filed November 27, 1936, and on December 10, 1935, denied. The date upon which the application for appeal is presented is January 15, 1937.

Appellants by their amended complaint, filed in the Superior Court of the State of Washington, for Thurston County, set forth that they were engaged in constructing the Grand Coulee Dam pursuant to a contract dated July 16, 1934, between the United States of America, party of the one part, and appellants as parties of the other part, whereby appellants had agreed to furnish labor and materials and to perform work required for the construction of a portion of the Grand Coulee Dam and power plant on the Columbia Basin project. Appellants by their complaint further set forth that they were each and all non-residents of the State of Washington and were within the State of Washington solely for the purpose of the performance of their contract, and further set forth that the contract was being performed wholly upon land acquired by the United States Government with the consent of the State of Washington, jurisdiction over which had been ceded to the United States by the said State.

By their said amended complaint appellants alleged that the levy of the occupation tax by the State of Washington for the privilege of performing their contract with the United States Government and based in amount upon a percentage of the gross contract price is a direct interference by the State with the United States Government.

By their said amended complaint appellants specially set up and claimed that the Occupation Tax Act of the State of Washington was invalid on the ground of its being repugnant to the Constitution of the United States of America because levied upon an occupation carried on upon lands jurisdiction over which had been ceded to the United States by the State of Washington, and that therefore the said Act was a violation of Section 10 of Article 1 of the Constitution of the United States, and of the Fourteenth Amendment thereto, and of Clause 17 of Section 8 of Article 1 of the said Constitution, and further that the said Act was invalid as repugnant to matters inherent and instinct in the Constitution of the United States.

The prayer of appellants' complaint was for an injunction restraining the enforcement as against them of the Occupation Tax Act of the State of Washington.

The decision of the Superior Court of the State of Washington, for Thurston County, was against appellants' contentions and in favor of the validity of said Act, and resulted in a decree denying any relief to appellants and dismissing their complaint. Upon appeal to the Supreme Court of the State of Washington the same matters were relied upon as in the trial court and the protection of the Constitution of the United States and of its several provisions were specially set up and relied upon, both in appellants' opening brief, in their reply brief, in their petition for rehearing and in their supplemental petition thereto.

There is appended hereto, marked Exhibit "A," a copy of the opinion in Cause No. 26059 in the Supreme Court of

the State of Washington, entitled Silas Mason Company, Inc., Walsh Construction Company, Guy F. Atkinson, George H. Atkinson, William E. Kier, and Elmer L. Kier, co-partners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company, Appellants, *v.* The State Tax Commission *et al.*, Respondents, and there is appended hereto, marked Exhibit "B", a copy of the opinion in Cause No. 26060 in the Supreme Court of the State of Washington, entitled David H. Ryan, Appellant, *v.* The State of Washington, Respondent, David H. Ryan, Appellant, *v.* The State Tax Commission, Respondent.

It is believed that the following cases sustain the jurisdiction of this Court in the circumstances:

Panhandle Oil Co. v. *Knox,* 277 U. S., 218.
Northwestern Ins. Co. v. *Wisconsin,* 275 U. S., 136.
Gillespie v. *Oklahoma,* 257 U. S., 501.
McCulloch v. *Maryland,* 4 Wheat., 316.
Ft. Leavenworth R. R. Co. v. *Lowe,* 114 U. S., 525.
Surplus Trading Co. v. *Cook,* 281 U. S., 647.

B. H. KIZER,
ARNOLD L. GRAVES,
Counsel for Appellants.

GRAVES, KIZER & GRAVES,
Of Counsel for Appellants.

EXHIBIT "A".

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 26059. En Banc.

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, Guy F. Atkinson, George H. Atkinson, William E. Kier, and Elmer L. Kier, Co-partners as Atkinson-Kier Company. and Mason-Walsh-Atkinson-Kier Company, *Appellants,*

v.

THE STATE TAX COMMISSION et al., *Respondents.*

(Filed Oct. 28, 1936.)

The question in this case is the power of the State of Washington to exact its occupation tax from the appellants in respect of the compensation received by them from the Federal government for the construction of the Grand Coulee dam and power plant. The case is here on appeal from a judgment of the superior court denying injunctive relief against threatened proceedings by the respondents, members of the State Tax Commission, to enforce collection of the tax.

By contract, made September 17, 1934, with the United States, acting through the Bureau of Reclamation, the appellants, other than the Mason-Walsh-Atkinson-Kier Company, for a lump sum of approximately twenty-nine million dollars, engaged to construct the dam and power plant in accordance with plans and specifications therefor embodied in the contract by reference. The contract was awarded to the appellants upon competitive bids and after public notice of a call for tenders. The appellant Mason-Walsh-Atkinson-Kier Company was not a party to the contract but was formed by the contractors to have immediate charge of the work as their agent and representative in fulfilling the contract.

The appellants, both corporate and individual, are nonresidents of the State, and their sole business in the State

is the prosecution of the work required by their contract.

As necessarily incidental to the prosecution of the contract, they conduct stores, mess-houses, and other commercial activities at the dam site for the convenience of the great number of employees engaged and their families, as well as all others of the public who have occasion to visit the works. As to these collateral activities, they are conforming to the State laws and paying such license, sales, and other taxes as are required by the State.

The challenged occupation tax is sought to be assessed against the appellants pursuant to chapter 191, Laws of 1933, p. 869 *et seq.*, as amended by chapter 57, Laws of 1933, Ex. Ses., p. 157 *et seq.*, providing:

> "From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from every person engaging or continuing within this state in any business not specifically taxable under section 2 of this act, an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *"
> Laws of 1933, Ex. Ses., p. 157, § 1.

It was held in Rainier National Park Co. *v.* Henneford, 182 Wash. 159, 45 P. (2d) 617, that while the tax imposed by chapter 191 is an excise and not a property tax, it is in no sense a license tax and is not imposed as a prerequisite to entering into, or for the regulation of, business, but solely for revenue purposes.

The appellants contend that they are engaged in the work required by their contract as an instrumentality of the government of the United States, and as such, are immune from the occupation tax. The appellants also contend that their operations are conducted in territory exclusively occupied by the Federal government under cession of jurisdiction by the state, and that, by reason of this fact, the

state laws are inoperative upon them. While reserving this second objection to the tax, the point is not argued in the appellants' briefs. However, the question is urged in a companion case and disposed of adversely to the appellants' contention. Ryan *v.* State, — Wash. Dec. —.

It is unnecessary to set out in any detail the provisions of the contract and specifications. It is enough to say, insofar as the fact is material, that while, under its terms, the Federal Government reserves a large measure of supervisory control for the purpose of insuring proper standards of material and workmanship and a compliance with the policy of the government in respect of the conditions of labor, the appellants are independent contractors.

The principle upon which the immunity of Federal instrumentalities and agencies from state taxation rests is stated in Railroad Co. *v.* Peniston, 85 U. S. (18 Wall.) 5, where, after referring to the rule often declared by that court that the taxing power of the state is one of its attributes of sovereignty, indispensable to its continued existence and not dependent upon the constitution of the United States or derived from that instrument, it is said:

> "There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National government is legitimately exercised within the States. While it is true *that* government cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government."

In Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, it is said that just what instrumentalities of either a state or the Federal government are exempt from taxation by the other, cannot be stated in terms of uniform application. Admit-

tedly, those instrumentalities through which either government immediately and directly exercises its sovereign powers are immune from taxation by the other, and the court refers to illustrative instances in which the claim of immunity was upheld because the instrumentalities taxed were all so intimately connected with the necessary functions of government as to fall within the established exemption.

> "When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. Thomson *v.* Pacific Railroad, 9 Wall. 579; Railroad Co. *v.* Peniston, 18 Wall. 5; Baltimore Shipbuilding Co. *v.* Baltimore, 195 U. S. 375; Gromer *v.* Standard Dredging Co., 224 U. S. 362, 371; Fidelity & Deposit Co. *v.* Pennsylvania, 240 U. S. 319; Choctaw, O. & G. R. R. Co. *v.* Mackay, 256 U. S. 531.
>
> "As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operations. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. McCulloch *v.* Maryland (4 Wheat. 316), *supra;* Collector *v.* Day (11 Wall. 113), *supra;* Dobbins *v.* Commissioners of Erie County (16 Pet. 435), *supra.* * * *

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its power. Hence the limitation upon the taxing powers of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (South Carolina *v.* United States, 199 U. S. 437, 461; Flint *v.* Stone Tracy Co., *supra* (220 U. S. 107), at 172,) or the appropriate exercise of the functions of the government affected by it. Railroad Co. *v.* Peniston, *supra,* 31." Metcalf & Eddy *v.* Mitchell, *supra.*

In that case, consulting engineers had been employed to advise states or their subdivisions with reference to proposed water supply and sewage disposal systems. They claimed exemption from the Federal income tax upon the portion of their net income earned through this public employment. Adverting to the principle that any taxation by one government of the salary of an officer or the public securities or an agency created and controlled by the other, is prohibited, the court continues:

"But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way."

In Baltimore Shipbuilding Co. *v.* Baltimore, 195 U. S. 375, where it was held that a state might tax the interest

of a corporation in a dry dock which the United States had the right to use under a contract with the corporation, the court said:

> "It seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

In Fidelity & Deposit Co. *v.* Pennsylvania, 240 U. S. 319, a state tax on premiums collected by bonding insurance companies on surety bonds required of United States officials was held valid. It is said: "But mere contracts between private corporations and the United States do not necessarily render the former essential government agencies and confer freedom from state control."

General Construction Co. *v.* Fisher, 149 Ore. 84, 39 P. (2d) 358, 97 A. L. R. 1252, decided in December, 1934, is a case similar in its features to the present one. There, as here, a foreign corporation, qualified to do business in the state of Oregon, entered into a contract with the Federal government to furnish labor and material for the construction of the Owyhee dam and irrigation works in connection with the Owyhee irrigation project in Eastern Oregon. The work was done through the Department of the Interior, and the only net income received by the contractor from its operations in Oregon for the period involved was derived from the contracts with the United States government. The Oregon state tax commission exacted, from the plaintiff, large sums levied upon its income from its operations during several years. The taxes were paid under protest and to prevent levy being made on certain machinery and equipment necessarily used by the contractor in performing its contract with the United States government. Suit was brought to recover the amount of taxes so paid, the complaint alleging, as one of the grounds of attack upon the tax, that it was an unwarranted burden upon the functions of the Federal government. The trial court sustained a demurrer to the complaint, and a judgment was entered dis-

missing the action. On appeal to the supreme court of Oregon, the judgment of the trial court was affirmed.

The court held that when the construction company, as an independent contractor, entered into a contract to perform labor for, and furnish material, to the Federal government, it did not thereby become a part, or an instrumentality, of the United States, and its property, and its rights to conduct business within the state were not immune from taxation by the state wherein it was located in performing its contract, citing Thompson *v.* Union Pacific Ry. Co., 76 U. S. (9 Wall.) 579, 19 L. Ed. 792; Baltimore Shipbuilding & Dry Dock Co. *v.* Baltimore, 195 U. S. 375, 25 S. Ct. 50; Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, 46 S. Ct. 172; Gromer *v.* Standard Dredging Co., 224 U. S. 362, 32 S. Ct. 499. Continuing:

> "* * * the property of plaintiff within the state of Oregon was subject to taxation by the state even though used in performing a contract with the federal government. The property thus being taxable, the privilege of using it for such purposes, based on the net income derived from its use is also taxable, whether called a property tax, a privilege tax, or an income tax. In the final analysis it all amounts to the same thing. It was the property of plaintiff that plaintiff alleges was to be taken for the tax.
>
> "The principle of immunity from state or local taxation of the property and instrumentalities of the United States is generally based upon the direct ownership, or use and control of the property by the United States. Such immunity does not extend to the property of an independent contractor for gain even should it be used in carrying out a contract with the United States. The same principle obtains regarding taxation by the United States of incomes derived by persons and corporations from the state; Metcalf *v.* Mitchell, *supra.*"

Commenting on the contention made that the imposition of a tax tended to hamper and delay the Federal government in carrying out its contracts, the court said:

> "Every tax levied has some remote tendency to interfere with the contractual relations between parties, but

that is no reason why such parties should not contribute their just proportion to the expenses of maintaining the government from which they demand protection for their property and privileges. In the instant case the work performed by plaintiff was undoubtedly let to the lowest responsible bidder. We cannot see how the tax complained of in any way impaired said contract or hindered the federal government in its governmental functions."

An appeal from the decision in that case to the supreme court of the United States was dismissed (General Const. Co. *v.* Fisher, 295 U. S. 715, 55 S. Ct. 646) upon the authority of Trinityfarm Const. Co. *v.* Grosjean, 291 U. S. 466, 54 S. Ct. 469; Metcalf & Eddy *v.* Mitchell, 269 U. S. 514, 46 S. Ct. 172; Lucas *v.* Howard, 280 U. S. 526, 50 S. Ct. 87; Lucas *v.* Reed, 281 U. S. 699, 50 S. Ct. 352; Alward *v.* Johnson, 282 U. S. 509, 514, 51 S. Ct. 273; Willcuts *v.* Bunn, 282 U. S. 216, 224, *et seq.;* 51 S. Ct. 125; and Baltimore Shipbuilding Co. *v.* Baltimore, 195 U. S. 375, 382, 25 S. Ct. 50.

In Six Cos. *v.* DeVinney, 2 F. Supp. 693, the plaintiff, contractor on Boulder dam and power plant, sought to enjoin the collection of taxes levied by the state of Nevada upon its personal property and poll taxes alleged to be due from its employees, claiming to be an instrumentality of the United States and, as such, not subject to the revenue laws of the state. Holding against the plaintiff's contention, Norcross, district judge, said:

"The case of a corporation contractor for the construction of public works is one in which, if it may be said to be an instrumentality of the government, its relations to the government are nevertheless purely contractual. It does not exercise governmental functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying. In the case of Clallam County *v.* United States, 263

U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328, the court held that 'the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war,' and said: 'This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account.' "

In the case before us, while it is a fact that the appellants are, for the time, performing no work within the State other than that covered by their contract with the Federal government, they are in no sense creatures of the government, nor brought in by the government especially for the work. The parties to the contract are general contractors engaged in contracting throughout the United States, and the two corporate contractors have qualified themselves to do business in the State of Washington.

In State *v.* Wiles, 116 Wash. 387, 199 Pac. 749, Wiles had entered into a written contract with the United States government whereby he agreed to carry the United States mail in the city of Seattle between the various depots, wharves, docks, postoffice, and substations, and for the purposes of the contract, he used motor trucks. He was required to provide vehicles for the carriage of the mail and to keep them properly equipped and repaired. Under the contract, the trucks were to be used only in the business of carrying the United States mail. Refusing to obtain a license authorizing the operation of his trucks, he was convicted of operating trucks upon the highways of King County without a license, as required by the State laws. On his appeal to this court, the appellant contended that he was an instrumentality selected by the government in the performance of its governmental functions and, as such, was immune from the obligation to obtain and pay for a license; that since he was doing for the government what it might do for itself to impose a tax upon him would be in effect to impose it upon the government, because any private person carrying mail would necessarily require the government to pay him an additional amount equal to the

tax. Commenting on this contention and the authorities urged in support of it, the court said:

> "Here there is no effort to tax the business of carrying the mail. The appellant is not a direct instrumentality of the government; he is a personal contractor, doing certain work for the government, at a fixed compensation. In no sense is he the representative or agent of the government nor an integral part of it * * *
>
> "A person building a state road is nothing but a contractor; he is no part of the state or its agencies, and does not thereby inherit the various immunities of the state. There is nothing in appellant's contract which indicates that the government intended to pass its immunities on to him. Under these circumstances it should be presumed that it was the intention that he should be subject to the general laws of the state."

Deducing the rule from the authorities cited, we said:

> "While it is true, generally speaking, that a state may not by its laws hamper and interfere with the free and orderly performance of governmental functions, by taxation or otherwise, yet that interference must be substantial and direct. Every indirect and immaterial interference with the conduct of government business is not violative of the principles upon which the Federal government is founded and performs its duties. The rule of reason must control in all such questions, otherwise the states will be greatly hampered in the conduct of their affairs, without any correspondent benefit flowing to the national government."

The appellants cited Panhandle Oil Co. *v.* Mississippi *ex rel.* Knox, 277 U. S. 218, 48 S. Ct. 451, 46 A. L. R. 583, and Graves *v.* Texas Co., 56 S. Ct. 818. These cases involve a tax on the sale of gasoline to the United States and are alike in principle. In the latter case, the State of Alabama levied an excise tax of six cents a gallon upon storers of gasoline, accruing at the time of withdrawal from storage. This tax was challenged by corporations storing and selling to the United States large quantities of gasoline required by it for its governmental uses, and delivered pursuant to written

contract. There was some contention that the law was one taxing mere storage and not sale, and, as such, was properly taxable by the state. The court was of the opinion that storing alone was not intended to be taxed, but, assuming that by the acts under consideration, the state meant to tax mere storing, the court held that that purpose could not be given effect in respect of the company's sales and deliveries to the United States, without infringing the constitutional principle which safeguarded the Federal government against state taxes.

> "Plainly, the sales and deliveries by the company to the United States necessarily include storing and withdrawal from storage. A tax upon anything so essential to the sale of the gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement. To apply any other test of constitutionality would be to treat 'a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing.' Brown *v.* Maryland, 21 Wheat. 419, 444, 6 L. Ed. 678. As held in the Panhandle case (277 U. S. 218, at page 222, 48 S. Ct. 451, 452, 72 L. Ed. 857, 56 A. L. R. 583): 'A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons.' So far as concerns the federal immunity from state taxation, a tax upon storing or withdrawal so involved cannot be distinguished from the tax on sales imposed by the Mississippi statute condemned as unconstitutional."

In our opinion, there is a vital distinction between the Graves and the Panhandle Oil Co. cases and the present case. There, the tax of so many cents per gallon was exacted upon every gallon that left the storage for delivery to the United States. The tax was on the sale to the government and was direct and immediate. Here, the occupation

tax is but one of numerous incidental expenses necessarily inhering in the qualification of the contractors to perform the work for the government

The case of Trinityfarm Construction Co. *v.* Grosjean, 291 U. S. 466, involved a tax of five cents per gallon levied upon gasoline by the state of Louisiana. A contractor with the Federal government for the construction of levees in Louisiana, to control the waters of the Mississippi river, challenged the right of that state to exact the gallonage tax on gasoline purchased and used by the contractor in performing its contract with the Federal government. In upholding the tax, the court said:

> "The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi River, and to authorize the performance of the work directly by government officers and employees or pursuant to contracts such as those awarded to appellant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor. The exaction in respect of its relation to the Federal undertaking is wholly unlike those considered in Choctaw, O. & G. R. Co. *v.* Harrison, 235 U. S. 292; Indian Oil Co. *v.* Oklahoma, 240 U. S. 522; and Gillespie *v.* Oklahoma, 257 U. S. 501. Appellant is an independent contractor. Casement *v.* Brown, 148 U. S. 615, 622. It is not a government instrumentality. Cf. Metcalf & Eddy *v.* Mitchell, 269 U. S. 514. Group No. 1 Oil Corp. *v.* Bass, 283 U. S. 279. Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate

> power. If the payment of state taxes imposed on the property and operations of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct. Thomas *v.* Gay, 169 U. S. 264, 275. Metcalf & Eddy *v.* Mitchell, *supra*, 524 *et seq.* Wheeler Lumber Co. *v.* United States, 281 U. S. 572, 579. Appellant's claim of immunity is without foundation."

This case, contrasted with Graves *v.* Texas Co., and the Panhandle Oil Co. case, illustrates, we think, the distinction in principle involved. In the Graves case, the tax was laid upon the direct sale to the government. In the Trinityfarm Construction Co. case, a like tax was paid by the contractor, but the sale was not made directly, or in effect, to the Federal government. It was argued that the tax inhered in the cost of the work performed by the contractor, and, therefore, affected the governmental operations as effectively as if the gasoline had been actually sold to the government. But the court brushed this contention aside by saying that the tax was not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the Federal government was a party or in which it was immediately or directly concerned.

And so, in the present case, the means chosen by the government for building the dam and power plant was by contract, rather than the doing of the work directly by its own officers or agencies.

In Weston *v.* City Council of Charleston, II Peters 449, the city of Charleston had levied a tax on "six and seven per cent. stock of the United States." In holding the tax void as an unauthorized imposition upon an instrumentality of the Federal government, Chief Justice Marshall used this language:

> "It is admitted by the counsel for the defendants that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

"The distinction is, we think, apparent. When lands are sold, no connexion remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connexion between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government stands, we think, on very different principles from a tax on lands which the government has sold. • • •

"The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

We have here an early recognition of the distinction we are making between the cases of Graves *v.* Texas Co., *supra*, and Trinityfarm Construction Co. *v.* Grossjean, *supra*. The tax was on the contract to repay money borrowed. After the borrowed money was repaid to the lender, the government was no longer concerned or affected. Here, the government, by its contract, agreed to pay the contractors a lump sum for the rendition of specified services. When the money is earned and paid to the contractor and becomes a part of his gross earnings, the Federal government is no longer concerned with what he may be required to pay as a tax upon the privilege of doing business in this state, no more so than it was concerned in the amount of the tax paid upon gasoline, by the contractor, in building the Mississippi river levees.

In Railroad Co. *v.* Peniston, 85 U. S. 5, *supra*, the Union Pacific Railway, a corporation chartered by Congress, sought, by reason of the source of its incorporation and certain services agreed to be rendered to the government of the United States, to avoid taxes levied upon its property

by one of the counties of the state of Nebraska. The court, in upholding the tax, pointed out that, as it was levied on the property of the railroad only, it did not affect its capacity to render whatever governmental services it owed the government. In a dissenting opinion, Justice Bradley, after contending that the rule established in McCulloch *v.* Maryland, 4 Wheat. 316, and other cases following it, should be applied, makes this significant concession to the prevailing opinion:

> "The case differs *toto coelo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards his State is of no consequence to the government, so long as his contract, and its execution are not interfered with. In that case the contract is the means employed for carrying into execution the powers of the government, and the contract alone, and not the contractor, is exempt from taxation or other interference by the State government."

Our conclusion is that the trial court correctly held appellants liable for payment of the challenged tax, and its judgment denying injunctive relief is, accordingly, affirmed.

GERAGHTY, *J.*

We concur:

MILLARD, *C. J.*
MAIN, *J.*
MITCHELL, *J.*
TOLMAN, *J*
HOLCOMB, *J.*
BEALS, *J.*
BLAKE, *J.*
STEINERT, *J.*

EXHIBIT "B".

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26060. En Banc.

DAVID H. RYAN, *Appellant,*

v.

THE STATE OF WASHINGTON, *Respondent.*

DAVID H. RYAN, *Appellant,*

v.

THE STATE OF WASHINGTON, *Respondent.*

(Filed October 28th, 1936.)

Plaintiff brought these two actions seeking (1) the refund of an amount exacted from, and paid by, him as an occupation tax and (2) an injunction to prevent the imposition against him of a subsequent tax of the same kind. Trial before the court, without a jury, resulted in a dismissal of both actions. Plaintiff has appealed.

The taxes imposed by the state in the first case were based upon the total amount of sales of merchandise made by appellant and also upon the total amount of gross income received by him in the performance of a Federal government contract, all such sales and operations having been made and conducted within the area comprised in what is known as the Columbia basin project. The tax sought to be enjoined in the second case was based upon the total amount of gross income received by appellant in the performance of a second, and subsequent, Federal government contract operating within the same area. The principal question in the first case, and the only question in the second, is whether the state of Washington had any jurisdiction *within* the territory of the project, sufficient to permit the state to impose and collect an occupation tax for

services rendered therein by appellant to the Federal Government.

A brief history of the Columbia basin project will be of aid to a clearer understanding of the problem involved.

For a number of years, the people of this State have been actively interested in the development of the Columbia River and its tributaries. Between 1918 and 1932, many surveys and reports were made by engineers employed either by the state or else by the bureau of reclamation or the war department of the United States. These surveys and reports had relation to navigation, the development of hydro-electric power, and the reclamation of arid lands by irrigation. The state and its people were directly and particularly interested in, and concerned with, the features of power and reclamation. In 1932, the chief of engineers of the United States Army, after an exhaustive investigation, recommended a comprehensive plan for the improvement and development of the Columbia River for the purposes of navigation, flood control, power and irrigation. The plan contemplated the ultimate construction of ten dams in the Columbia River, the first of which, together with a power plant, was to be erected at the head of Grand Coulee.

In 1933, the state legislature created the Columbia Basin Commission, consisting of five members, and authorized them to enter into contracts and to employ any and all means necessary to secure the immediate development of the Columbia basin project by means of the proposed Grand Coulee dam and the orderly development of the power, water and soil resources incident thereto (Chapter 81, Laws of 1933, p. 376, Rem. Rev. Stat. (Supp.) § 3017-1 (P. C., § 5724-26) *et seq.*

During this period of preparatory activities, the Grand Coulee dam and power plant had an indeterminate status, owing to the uncertainty as to whether the project would be a state or a Federal project. It seems that originally it was contemplated that the Columbia Basin Commission should at least carry on the necessary preliminary engineering. For that purpose, the Columbia basin commission obtained from the state emergency relief commission an allocation of $377,000 of emergency relief funds. This had

the effect of tying in the project with the matter of emergency relief work, which was seriously engaging the attention of this, and of other States, at that time.

On June 30, 1933, the Columbia basin commission, in pursuance of its plan, entered into a contract with the United States, represented by the bureau of reclamation, department of the interior, wherein the United States agreed to make the topographic surveys and explorative work and to prepare the designs and specifications for construction work on the dam, for which the Columbia Basin Commission agreed to pay an initial sum of $50,000 at the time of the execution of the contract and the balance of the allocation of $377,000 as the work progressed. It appears that, during the period with which we are here concerned, the greater part of the $377,000 was paid as agreed.

It soon became apparent, however, that the work of construction itself would be of such magnitude and the expense so great that its completion would require the intervention of no less an agency than the Federal government itself, with the unlimited financial resources at its command. Consequently, steps were taken to have the Grand Coulee dam and power plant included in the Federal public works program. After considerable effort, this was accomplished, and an allocation of sixty-three million dollars for the dam and power plant was made by the Federal bureau commonly known as NIRA.

On November 1, 1933, the United States, represented by the Secretary of the Interior, and pursuant to the reclamation laws and the National Industrial Recovery Act, and the state of Washington, acting through the Columbia basin commission, entered into a contract relating to the construction of the dam, power plant and power transmission lines at the Grand Coulee site, under the comprehensive plan above mentioned.

Some of the provisions of that contract are of particular interest in this controversy. The contract began with a series of ten recitals. No. 1 referred to the fact that the allotment of sixty-three million dollars, appropriated by NIRA, had been made available for the *construction* of the dam and power plant. No. 9 recited that the increased

amount of firm power made possible at the lower dams by reason of the storage behind the Grand Coulee dam was an important factor in making the lower dams self-liquidating. No. 10 referred to the fact that the Columbia basin commission had been created by the state legislature for the purpose of co-operating with the Federal government in *securing the construction* of the project and of the Grand Coulee dam.

The contract then set forth the articles of agreement by number. The first, which is numbered article 11, provided for the expenditure by the United States of sixty-three million dollars, or so much thereof as was found necessary, in the *construction* of a dam and power plant at Grand Coulee site. Article 12 provided that the United States should retain title to the dam and power plant until the cost of the project had been fully repaid into the treasury of the United States. Article 13 reads as follows:

> "13. Commission to Act in Advisory Capacity.—The Commission will act as an advisory board representing the state in an advisory capacity in conferences with officers of the United States *concerning the various important questions which may arise from time to time in connection with the construction and use of the said dam, power plant and transmission lines.*" (Italics ours.)

Then followed a number of provisions giving the State an option, for a period of eight and one-half years after the date of the contract, to purchase the perpetual right to the entire output of the dam and power plant, upon the conditions set forth in detail therein. Article 24 reads as follows:

> "24. Rules and Regulations by Secretary.—The Secretary shall have the right to adopt and promulgate rules and regulations for the administration of the said project and the right to determine and decide all questions arising in connection with or growing out of the construction or operation and maintenance of said proposed dam, power plants and transmission lines *and which are not expressly determined by law* or the

terms of this contract, and his decisions on such questions shall be conclusive." (Italics ours.)

At this point, appellant's first connection with the project appears. On November 29, 1933, appellant, a resident of San Diego, California, entered into a contract with the United States for the excavation of overburden at Columbia River dam site, Columbia basin project, "Washington," for the sum of $534,500. The specifications attached to and made a part of the contract, provided, among other things, that the appellant should obtain all required licenses and permits, should give preference, after ex-service men, to citizens who were residents of the county and *state in which the work was to be performed,* should furnish compensation insurance in compliance with the laws of the *state wherein the work was to be done,* and should comply with all applicable provisions of Federal, *state, and municipal* safety laws and building and construction codes.

Appellant entered upon the execution of the work under the contract about January 1, 1934, and completed it in the summer of the same year. During the entire performance of the work, appellant maintained his office and living quarters within the territory of the project as hereinafter designated.

After the completion of that contract, appellant, on July 18, 1934, entered into a second contract with the United States, which was for the construction of a railroad at Grand Coulee dam, Columbia basin project, "Washington," for the sum of $235,570. The railroad was to be 34.5 track miles in length, extending from the Northern Pacific Railway tracks at Odair, Washington, to the dam site. The specifications in this contract contained the same provisions as those to which we have specifically referred above. The actual residence of appellant, for about one-half of the time during which the second contract was being performed, was at Coulee City, which is outside of the territory of the project, and for the remainder of the time was at the dam site, on government land which had been obtained in the manner hereinafter described.

On July 16, 1934, which was two days before the execution of appellant's second contract, the United States en-

tered into a contract with Silas Mason Company, Inc., and others for construction work on Grand Coulee dam and power plant, Columbia basin project, "Washington," for the sum of $29,339,301.50. The last mentioned contract contemplated work on a gigantic scale, as is indicated by the figures just given. That contract, however, did not include the work to be done by appellant under either of his contracts.

We make reference, at this time, to the contract of Silas Mason Company, Inc., for the reason that out of it grew an action similar to the two involved here. Silas Mason Co. *v.* State Tax Commission, ante p. 60, — P. (2)d —. That action and these two were tried in the superior court at the same time and, by stipulation of the parties, all the evidence, in so far as it was material, was considered as applying to all three cases. The respective appeals were argued in this court on the same day, upon records containing identical statements of facts.

The specifications attached to the contract of Silas Mason Company, Inc., provided, among other things, and in addition to what has already been mentioned, that the contractor should make all necessary arrangements with the proper *state and county authorities* for school facilities, and that police protection for the contractor's camp and the area involved in and surrounding the construction work would be furnished by the Washington State patrol in cooperation with the Federal government, but that the contractor should provide, at its camp site, such jail facilities as were satisfactory to the Washington State patrol.

The area included in the entire project above mentioned does not specifically and satisfactorily appear from the record, and we are unable to say exactly how much land is included therein. It does appear, however, that the area is very extensive, covering many acres of land on both sides of the Columbia River and including a railroad right of way 34.5 miles in length. There are two important things, however, to be noted in this connection. The first is that, during the time that the construction work was in progress, the United States, through condemnation proceedings brought against a number of individuals and corporations,

acquired possession of, and title to, the various tracts of land now within the area of the project. A transcript of one of such condemnation proceedings, stipulated to be similar in form to all the others, is made a part of the record herein. It shows that the title to that particular tract was acquired by the United States on or after May 14, 1934, which was *after* appellant had commenced work. The other important factor to be noted is that, included in the area of the project, are school lands of the State and also tribal lands, all of which have been taken over by the Federal government and now form a part of the project.

At the seventy-fourth session of the United States Congress, an act was passed authorizing the construction, repair, and preservation of certain public works on rivers and harbors and for other purposes. The act ratified and validated all contracts and agreements that had been theretofore executed in connection with the Grand Coulee dam project H. R. 6732, Public Act 409. The work contemplated to be done upon the project by the United States was not in furtherance of any war measure or for the national defense, but simply for the improvement of navigation and for industrial recovery.

During the period of the construction work under his first contract, appellant maintained warehouses on ground within the project and at the dam site, where he stored and sold gasoline, oil, tires and automobile accessories. Appellant paid the State a tax on these sales, the recovery of which forms a part of the basis of his first action.

At its regular session of 1933, the legislature of this State passed an act commonly known as the occupation tax act, chapter 191, Laws of 1933, p. 869 *et seq.* The act related to certain business activities "within this State." At its special session of 1933, the legislature amended the former act in certain respects. Chapter 57, Laws of 1933, Ex. Ses., p. 157, *et seq.* That act likewise applied to business activities "within this State." The latter act became effective January 18, 1934, which was shortly after appellant's first contract had been entered into, but before it was performed.

These two actions are in resistance to the application of either of these legislative acts to appellant's activities.

Appellant's first contention is that his construction or excavation contracts constituted sales of services, within the provisions of chapter 191, and that by § 5, p. 879, of that act, read in connection with § 2 (2) (f), p. 875, the proceeds of his contracts were exempt from the tax.

The answer to this contention is that the tax was not imposed under chapter 191 as it originally stood, but under chapter 57, p. 157, § 1 (designated as § 2-a) (1), which clearly covers business activities of the kind engaged in by appellant, if "within this State." This contention of appellant is but briefly discussed by either counsel and, we think, merits nothing further than what we have already said.

The principal, and only remaining, question in the case is whether appellant's activities took place "within this State." Specifically stated, the contention of appellant is that by virtue of the United States constitution and the statutes of this State, the area contained within the project upon which the excavation and construction work was performed is under the exclusive jurisdiction of the United States; and that, therefore, any tax legislation of the State is wholly inoperative within the area of the project or upon any activities of appellant therein. Quotation of the specific constitutional and statutory provisions involved will first be made.

(1) Art. I, § 8, clause 17 of the Constitution of the United States provides that Congress shall have power:

> "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, *and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;* * * *" (Italics ours.)

Our reference to, and discussion of, this constitutional provision relate only to the latter, or italicized, portion of the quotation.

Rem. Rev. Stat., § 8108 (P. C. § 7110), adopted in 1891, provides that:

> "The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, * * * the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

It will be observed that the statute, while somewhat broader than Art. I, § 8, clause 17, in its designation of

structures and purposes, nevertheless specifically recites that the consent therein given is in accordance with the constitutional provision.

The provision of Art. I, § 8, clause 17, as above quoted and italicized, has been frequently construed by the United States Supreme Court, and it is now definitely settled and accepted that there are two ways in which lands within the jurisdiction of the State may become subject to the exclusive jurisdiction of the United States: (1) By purchase by the United States for certain specified purposes, with the consent of the State, and (2) cession of exclusive jurisdiction to the United States by the State. Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; United States *v.* Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761; Surplus Trading Co. *v.* Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091; Standard Oil Co. *v.* California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775.

From these cases, the following rules are deducible respecting jurisdiction over lands acquired by the United States for public uses: (1) When the land is acquired for one of the purposes within Art. I, § 8, clause 17, by purchase with consent of the State, Federal jurisdiction is exclusive in such area for all purposes; (2) when the land is acquired for one of the purposes within that clause, but other than by purchase with the consent of the State, then Federal jurisdiction is exclusive only to the extent of the purposes for which the land is held; (3) when the land is acquired for a purpose not within that clause, but by purchase with the consent of the State, then the United States has such jurisdiction over the land as may be ceded to it by the State; and (4) when the land is acquired for a purpose not within that clause, in any manner other than by purchase with the consent of the State, then the United States holds the land just as any other proprietor does, except that the land may not be taxed by the State. Our ultimate problem herein will be to determine under which one or more, if any, of these classifications, the present case falls.

Manifestly, the construction work involved in this case does not come within any of the uses implied in the descrip-

tive terms of the constitutional provision, unless it can be said to come within the term "other needful buildings." If the case were one of first impression, the rule *ejusdem generis* would, in our opinion, exclude such work from the classification of "needful buildings," because the particular work was in no way connected with, or related to, forts, magazines, arsenals or dockyards.

However, by judicial interpretation, over a long period of years, the term "needful buildings" has been applied to the following: a navy yard (Western Union Tel. Co. *v.* Chiles, 214 U. S. 274, 29 S. Ct. 613, 53 L. Ed. 994); a military hospital (Arlington Hotel Co. *v.* Fant, 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447); a military reservation (United States *v.* Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761); an army training and mobilization station (Surplus Trading Co. *v.* Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091); a customs house (Sharon *v.* Hill, 24 Fed. 726); locks and dams (United States *v.* Tucker, 122 Fed. 518); a post office (United States *v.* Andem, 158 Fed. 996); a penitentiary (Steele *v.* Halligan, 229 Fed. 1011); an Indian training school (United States *v.* Wurtzbarger, 276 Fed. 753); a military cemetery (Wills *v.* State, 50 Tenn. 141); a soldiers' home (Sinks *v.* Reese, 19 Ohio 306); a courthouse (State ex rel. Jones *v.* Mack, 23 Nev. 359, 47 Pac. 763, 62 Am. St. 811).

While the structures mentioned in the foregoing cases are not specifically named in, and do not strictly fall within, the constitutional classification, it is, nevertheless, apparent that the particular structures or "buildings" in those cases, with the possible exception of one, are such as would necessarily require absolute and exclusive jurisdiction in the United States government, because their operation is in the discharge of a constitutional or governmental function, and there is no field for State participation or State legislation.

The only possible exception in the list is the instance of locks and dams, involved in the Tucker case. But even in such case, if the locks and dams were owned and operated by the United States solely for the purpose of facilitating navigation, as they concededly were in that case, their func-

tion would likewise be a constitutional or governmental function. But irrigation, flood control, and power development (except in so far as the latter two are intended to promote navigation or else some war measure or the national defense), while they may be of national interest and serve a public purpose, are not functions enjoined upon the Federal Government by the Constitution, nor are they delegated to the United States by the Constitution, nor is it necessary that they be committed, for their operation, to the exclusive jurisdiction of the United States Government. Legislative power, with reference to such things, is reserved in the State.

Turning, now, to the statute above quoted, we note that the State has given its consent to the acquisition, by purchase or condemnation on the part of the United States, of lands for sites of locks, dams, etc., as well as for the purposes set forth in the constitutional provision. For present purposes, it may be conceded that the term "needful buildings" is broad enough, under the construction given to that term by the Federal courts, to include locks and dams. It is very probable that that specific mention of locks and dams was made in the statute in order to remove any doubt that may have existed generally at, and prior to, the time of the decision in the Tucker case, with respect to the inclusive intent of the constitutional provision.

The point that we make and stress here, and upon which we rest our ultimate conclusion herein, is that, while the statute conferred consent upon the United States to acquire land within the territory of the State, the State's power to cede jurisdiction is limited by the statute to those instances where it clearly appears that the land is to be used by the United States for a constitutional or governmental purpose. As stated in the leading case upon the subject, Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264, *supra:*

> "The essence of that provision (Art. I, § 8, clause 17, United States constitution) is that the State shall *freely* cede the particular place to the United States for one of the specific and enumerated objects." (Italics ours.)

(2) The question in this case, then, is whether, by reason of the conjunction of the constitutional provision, the statute, and the acquisition by the Federal Government of the lands within the project in the manner and for the purposes that the Government acquired them, the State has been *ipso facto* deprived of all jurisdiction with respect to such lands. However close the question may seemingly be, we are of the opinion that the State has not been deprived of all jurisdiction, but that it has a concurrent jurisdiction to the extent, among other things, that it has the right to impose a tax upon business activities conducted within the area of the project. The reason for this conclusion is based upon what we conceive to be fundamental principles of law and the conductive facts of this case.

By the enabling act of Congress, passed February 22, 1889, the territory of Washington became the State of Washington. Subject to the limitations and restraints of the Federal constitution, the State, as such, has all the sovereign powers of independent nations over all persons and things within its territorial limits. Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; New York *v.* Miln, 11 Pet. 102, 9 L. Ed. 648; Cummings *v.* Missouri, 4 Wall. 277, 18 L. Ed. 356. The area within, and under, the jurisdiction of a State may come under the exclusive jurisdiction of the United States by purchase by the Federal government for a purpose prescribed by the Federal constitution and with the consent of the State, or by cession of exclusive jurisdiction by the State to the United States. In either event, the land acquires a territorial status and ceases to be a part of the state, either territorially or jurisdictionally. Concessions Co. *v.* Morris, 109 Wash. 46, 186 Pac. 655.

But, since self-preservation is the first law of nations and states, as well as of individuals, it will not be presumed, in the absence of clearly expressed intent, that the State has relinquished its sovereignty. Wills *v.* State, 50 Tenn. 141; *In re* Kelly, 71 Fed. 545; Ex parte Gaines, 56 Ark. 227, 19 S. W. 602; Barrett *v.* Palmer, 135 N. Y. 336, 31 N. E. 1017, 31 Am. St. 835, 17 L. R. A. 720. (Four of these cases are cited approvingly in the Concessions Co. case.)

The power of taxation is an incident of sovereignty and inherent in the State, because government cannot exist or function without it. It is a legislative power following the more general power to make laws. State *ex rel.* Board of Commissioners *v.* Clausen, 95 Wash. 214, 163 Pac. 744. The power of taxation is never to be suspended, surrendered, or contracted away. Amendment XIV, Washington constitution. In the absence of constitutional restraint, the power of the legislature over taxation is as unlimited as the subject with which it deals. State *ex rel.* State Tax Commission *v.* Redd, 166 Wash. 132, 6 P. (2d) 619; 26 R. C. L. 27, § 13. The taxing power of the State is never presumed to have been relinquished unless the language in which the surrender is made is clear and unmistakable. Erie R. Co. *v.* Pennsylvania, 21 Wall. 492, 22 L. Ed. 595; 1 Cooley on Taxation (4th ed.) 159, § 60.

This is not a contest between the Federal government and the State as to jurisdiction. It is a contest between the State, asserting its concurrent, or partial, jurisdiction, and an individual who asserts that exclusive jurisdiction rests in the Federal government. So far from there being any contest as to jurisdiction between the two sovereign powers, the record discloses that they are working in harmony, and accord, each exercising the field for which it is the better equipped and each, at the same time, recognizing the field of the other. The Federal government, therefore, cannot possibly be prejudiced by the result of this action.

It appears from what we have already stated that prior to, at the time of, and at all times since, the inception of the project, the United States and the State have cooperated in every way in the development and construction of the dam and power plant. The Federal government at present furnishes the money, supervises the work, and will, for a time, maintain the operation of the project. The State, on the other hand, has furnished a large amount of money for the preliminary work and now, through the Columbia Basin Commission, acts in an advisory capacity to the Federal government in the further progress of the

work. The State also has an option to take over the entire project when completed.

The Federal government is involved in a huge undertaking, the object of which is to promote navigation, develop power, and provide for irrigation. The State is likewise concerned. Navigation is a function that comes within the exclusive power of the Federal government by virtue of the Constitution of the United States. The development of irrigation and of power for industrial purposes, however, is within the reserved powers of the State. There is, thus, every reason why the Federal government and the State should cooperate, and, in order to do so, each must have proportionate jurisdiction.

> "We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts preeminently of this—a duty oftentimes of great delicacy and difficulty." South Carolina *v.* United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261.

On the other hand, if the State were excluded from all jurisdiction, the residents of the project would be without school facilities, police protection, and the right to vote, the workmen would be deprived of the benefit of industrial insurance, and the rules for sanitation would be suspended; for, if the State be wholly without jurisdiction, then it must follow that the State may not extend its privileges to the residents of the project nor expend its money in their behalf. Opinion of Justices, 42 Mass. 580; *In re* Town of Highlands, 22 N. Y. Supp. 137; Sinks *v.* Reese, 19 Ohio 306;

State *ex rel.* Lyle *v.* Willett, 117 Tenn. 334, 97 S. W. 299; Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; Surplus Trading Co. *v.* Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091.

Furthermore, so far as the record supplies us with any information, the Federal government did not acquire these lands until after the work of construction, under appellant's first contract, had been begun. Some of the lands, it appears, were not acquired until about the time the work under the contract was completed. The record discloses that, when appellant entered into the second contract, although all of the lands had then been acquired, the State was exercising its jurisdiction within the project at the instance of the Federal government itself. Moreover, it does not appear from the record that the Federal government ever set apart any definite reserve as constituting the project, but, rather, that it appropriated lands from time to time as the necessities of the project required; this fact may not be a controlling one, but is nevertheless entitled to consideration.

The facts, taken as a whole, argue conclusively, in our opinion, that the State never intended to cede, and the United States never intended to take, exclusive jurisdiction over the project. Facts consistent with the retention, and inconsistent with cession, of exclusive jurisdiction by the State should, in the absence of any assertion by the Federal government to the contrary, be construed most strongly in favor of the State, to the end that its territory be not diminished and that its jurisdiction in matters in which the Federal government is not directly or immediately concerned be not entirely lost.

We conclude, therefore, that the purposes of the project, taken as a whole, do not fall exclusively within any of the enumerated classes mentioned above, so as to give the United States exclusive jurisdiction over the land, but, rather in a class where several purposes are so intermingled as to call for the exercise of jurisdiction by both the Federal government and the State, according as their respective interests and duties require. In so far as the legis-

lative acts in question are concerned, they are operative upon the business activities of the appellant within the project.

The judgments are affirmed.

STEINERT, *J.*

We concur:

MILLARD, *C. J.*
MAIN, *J.*
MITCHELL, *J.*
TOLMAN, *J.*
HOLCOMB, *J.*
BEALE, *J.*
BLAKE, *J.*
GERAGHTY, *J.*

(8806-C)